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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 178

ILLINOIS COMMERCE COMMISSION, JOHN D. BIGGS, WILLIAM PARRILLO, ET AL.,

Appellants,

vs.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPELLANTS' BRIEF.

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STATEMENT RESPECTING OPINIONS.

The court below delivered no written opinion or discussion of the case, but did make certain findings of fact and reached conclusions of law in connection with the entry of the decree in question (R. 50). The nature of the findings and conclusions, in relation to the facts in the case, appear later in this brief.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

This court has already noted probable jurisdiction in this case.

The final order, judgment or decree here appealed from was rendered by a statutory court consisting of one circuit and two district judges, specially convoked under the provisions of Section 266 of the Judicial Code (28 U. S. C. A., Sec. 380).

This order, judgment or decree (R. 56) permanently restrains the defendants (appellants here), who are the Illinois Commerce Commission and various Illinois state officials, from taking any action against the plaintiff (appellee here), who is trustee of the property of the Chicago and North Western Railroad Company, or his agents, on account of their charging increased fares for intrastate transportation of passengers on the railroad in question, or on account of their violation of a certain order of the Illinois Commerce Commission, entered on February 18, 1942. The order of the Illinois Commerce Commission last mentioned (R. 35) purported to suspend the effective date of the increased tariffs in question pending an investigation by that commission into the necessity for the propriety of such increases.

The plaintiff contended and the trial court held (R. 55) that an order of the Interstate Commerce Commission (R. 32), entered January 21, 1942, authorized and commanded the increase in tariffs; that such order superseded the jurisdiction of the Illinois Commerce Commission with respect to the increase; that the order was in all respects valid; and that the enforcement of any order by the Illinois Commerce Commission or of any state statute inconsistent with the order of the Interstate Commerce Commission would con-

stitute a violation of the federal constitution and of acts of Congress deriving their authority therefrom.

The defendants contended that:

First. The order of the Interstate Commerce Commission was void for want of adequate findings of fact, it being argued by the defendants that the purported findings in the order did not comply with the constitutional requirements of due process of law.

Second. That even if the order should be deemed valid, its tenor and purport was **not** to supersede state action, but merely to **authorize and approve** the increase in tariffs if such increase should be sanctioned by state legislatures or state regulatory commissions.

While the attack is upon this particular order and not upon the basic validity of the Illinois statute, it is contended by the plaintiff that the Illinois Public Utilities Act, upon which the said order necessarily must depend for its validity, cannot, consistently with constitutional principles, be regarded as authorizing the order in question. It is, therefore, quite obvious that the case does necessarily precipitate the question of whether the said Illinois Statute above referred to can constitutionally be applied to the plaintiff in the instant case.

The Illinois Public Utilities Act (Illinois Revised Statutes, Chapter 111⅔, sections 1-95, inclusive) above referred to provides, in substance, as follows:

Section 9 requires public utilities to obey the orders of the Commission.

Section 33 requires public utilities to file schedules of their tariffs with the Commission.

Section 34 requires public utilities to publish such schedules.

Section 35 prohibits public utilities from rendering services without filing schedules.

Section 36 prohibits public utilities from modifying their tariffs without notice to the Commission, and provides that the Commission may suspend the effec-

tive date of such new tariffs pending an investigation into their propriety but not for more than 120 days, plus an extension of 6 months if such investigation is not then completed.

Section 37 prohibits such utilities from charging more or less than their published tariffs.

Section 41 authorizes the Commission to fix and determine public utility rates.

Section 64 authorizes the Commission to hold investigations as to public utility rates.

Section 80 provides penalties for any violation of the Act.

Section 81 makes persons violating the Act guilty of a misdemeanor and subject to fines not to exceed $1,000.

Section 82 provides for actions to recover penalties for violations of the Act.

The complaint further contends that a certain Illinois statute, commonly known as the Illinois Two Cent Fare Law, approved May 27, 1907, as amended in 1913 (Illinois Revised Statutes, 1941, Chapter 114, Sections 154-156), is likewise unconstitutional as applied to this case. This Act provides, in effect, that it shall be unlawful for any railroad company carrying passengers between points in Illinois to charge in excess of two (2) cents per mile for such passage, and provides certain penalties for violations of such provisions to be recovered by actions to be brought by the Attorney General of the State, or by the State's Attorney of any County in which such railroad operates.

Section 266 of the Judicial Code (28 U. S. C. A., Sec. 380) concludes as follows:

"• • • and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

STATEMENT OF THE CASE.

Prior to and on March 7, 1942, the plaintiff collected the intrastate passenger fares fixed by an order of the Interstate Commerce Commission of October 6, 1925, in a proceeding entitled

> "In the Matter of Intrastate Rates Within the State of Illinois, No. 11705 (102 I. C. C. 479)."

A copy of this order appears as Exhibit "A" to the complaint (R. 19).

In December, 1941, the Interstate Commerce Commission undertook a "further nationwide general investigation of both freight rates and passenger fares to determine whether or not an increase of ten per cent therein should be authorized," that proceeding being known as

> "*Ex Parte* 148 Increased Railway Rates, Fares, and Charges, 1942" (R. 8).

On January 21, 1942, that Commission

> "authorized the railroads, including the plaintiff herein, to increase their passenger rates, fares and charges ten per cent." (Plaintiff's complaint, page 10, R. 8.)

A copy of this order appears as Exhibit "B" to the complaint (R. 32).

It is upon this order and upon this order alone that the plaintiff founds his contention that it is at once his right and his duty to charge the fares approved in such order. The plaintiff's complaint is not conceived in form or substance upon the theory that it asserts a right to have the propriety of the schedule of increased rates determined by a court independently of and without regard to the order of the Commission.

The first two paragraphs of the order recite matter of procedural history—the filing of the petitions, the notifi-

cation of the authorities of all states, the fact that hearings have been had and investigation made, and that the Commission has had the co-operation and advice of a committee consisting of members of state regulatory authorities (R. 32).

The only recital purporting to state the basis for the order is contained in the third and fourth paragraphs, which are in full as follows (R. 33):

> "*It further appearing*, that the increase in fares proposed is necessary to meet, in part, increased operating expenses incurred or to be incurred by said petitioners because of the payment by them of (a) increased wages to employees, (b) increased cost of materials and supplies, and (c) additional expenditures to safeguard petitioners' properties and operations during the present emergency; the details of which will be stated in a report hereafter to be made respecting the proposed increased freight rates and charges;
>
> "And the Commission does hereby find that the increase in fares proposed is necessary to enable petitioners to continue to render adequate and efficient railway transportation service during the present emergency; and that, upon consideration of said petitions and the evidence of record, that the proposed increased fares will be reasonable and lawful."

The provisions of the order expressing its purposes and operative effect are as follows (R. 33-34):

> "*It is ordered*, That the increased passenger fares as proposed by the said petitioners be, and they are hereby, approved, provided that where the total increased fares are less than $1 fractions of less than one-half cent shall be dropped and fractions of one-half cent or greater may be increased to the next whole cent, and that where the total increased fares are more than $1 such fares shall end in 0 or 5, but no more than 2.5 cents shall be added to the present fares as increased by 10 per cent in order to make such total fares end in 0 or 5.

"*It is further ordered*, That all outstanding orders, as amended, of the Commission, authorizing or prescribing interstate and intrastate fares, or bases of fares, be, and they are hereby, modified, effective concurrently with the establishment of the increased fares herein approved, only to the extent necessary to permit the increase herein authorized to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, said outstanding orders; and that a copy of this order shall be filed in the docket of each such proceeding, including those proceedings under section 13 of the Interstate Commerce Act enumerated in the order of February 28, 1936, in docket No. 26550, *Passenger Fares and Surcharges*.

"*It is further ordered*, That all tariffs or supplements changing fares by authority of this order, which are maintained or held by authority of outstanding orders of the Commission, shall bear on their title pages specific reference to this order.

"*It is further ordered*, That the increased fares herein authorized may be made effective upon not less than 10 days' notice to the Commission and to the general public by publishing, filing, and posting in the manner provided in section 6 of the Interstate Commerce Act; that a copy of this order be served on each of said petitioners and on the Governors of the several States.

"*And it is further ordered*, That jurisdiction be, and it is hereby, retained by the Commission, for the purpose of determining, if need be, the lawfulness of any particular fare or fares, resulting from this order.

"The Commission not yet having determined the remaining issues involved, namely, those relating to the rates and charges for the transportation of freight, and services connected therewith, and for the transportation of milk and cream, jurisdiction is hereby retained for the purpose of further consideration and determination of such other issues herein."

The complaint also refers to a supplemental report of

the Commission of March 2, 1942, and quotes therefrom the following language (R. 8):

> "Because of the abnormal conditions which now prevail throughout the country we are of the opinion that the increased fares proposed will yield substantial amounts of additional revenues, and that the passenger service justly and reasonably should contribute to meeting the added operating costs of the railroads.
>
> "In an appropriate order made in this proceeding on January 21, 1942, we found that the increase in fares proposed is necessary to enable the petitioners to continue to render adequate and efficient railway transportation service during the present emergency, and that the proposed increased fares will be reasonable and lawful. We therein approved the proposed increased fares subject to a suitable rule for the disposition of fractions stated in the order.
>
> "All our outstanding orders, as amended, authorizing or prescribing interstate and intrastate fares, or bases of fares, were modified by that order, effective concurrently with the establishment of the increased fares therein approved, to the extent necessary to permit the authorized increase to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, such outstanding orders. We retained jurisdiction for the purpose of determining, if need be, the lawfulness of any particular fare or fares resulting from that order. Increased fares were filed and became effective February 10, 1942.
>
> "The foregoing findings as made in our order of January 21, 1942, are here renewed and affirmed."

The complaint and exhibits set forth no other matter in the nature of findings supporting the order. However, although the pleadings do not require either the defendants or this court to recur to portions of the report of March 2, 1942, not set forth in the complaint and not before the court, and although perhaps strict practice would not even permit us to search records not pleaded in order to find a

further basis upon which the order in question might be aided or supported, the defendants do not insist upon a technical attitude which would restrict the vision of this court to the letter of the complaint and its accompanying exhibits. The defendants have therefore independently examined the last mentioned report in quest of further matter in the nature of findings in support of the complaint. For the convenience of the court, and for such comfort as the report at large may afford the plaintiff in this case, the defendants quote, in an appendix to this statement, *all* of the recitals of the Commission in the report under the caption of

"Passenger Fares and Passenger Train Service."

Upon consulting these recitals, it will appear that the findings incorporated in the order proper are not substantially amplified. (Appendix B.)

SPECIFICATION OF SUCH OF THE ASSIGNED ERRORS AS ARE INTENDED TO BE URGED.

The defendants intend to urge the following errors assigned upon the record:

1. The court erred in not holding as a matter of law that the supposed and purported order of the Interstate Commerce Commission, dated January 21, 1942 (R. 32), mentioned above, was void because it was not supported either by the recitals in the text thereof or otherwise by adequate and sufficient findings of the facts upon which it was based.

2. The court erred in failing to hold that this supposed and purported order, even if valid according to its terms and purport, merely permitted the plaintiff to increase the rates in question, but that the order intended and contemplated that the plaintiff was nevertheless not exempted from the necessity of obtaining the sanction, authority or permission of the Illinois Commerce Commission before so increasing such rates.

Therefore the court erred in overruling the defendants' motion to strike the complaint, in entering the decree appealed from, and in not dismissing the plaintiff's complaint for want of equity and upon the merits (*Errors Assigned*, R. 62 and 63).

SUMMARY OF ARGUMENT.

I.

The Order of the Interstate Commerce Commission Entered January 21, 1942, Relied Upon by the Plaintiff as Authorizing the Increase of Rates in Question, Is Void for Want of Sufficient Findings of Fact.

State of Florida v. *United States*, 282 U. S. 194.

U. S. v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499.

Wichita R. R. Co. v. *Public Utilities Commission*, 260 U. S. 48.

Atchison Ry. v. *United States*, 295 U. S. 193.

Panama Refining Co. v. *Ryan*, 293 U. S. 388.

U. S. v. *Louisiana*, 290 U. S. 71.

Georgia Comm. v. *United States*, 283 U. S. 765.

II.

Whether the Order of the Commission Is Valid or Invalid, It Does Not by Its Terms Purport to Do More Than Approve and Withdraw Federal Opposition From the Increased Rate Schedule; and It Is Still Incumbent Upon the Railroads to Procure Appropriate Authority From the States With Respect to Intrastate Rates.

Transit Commission v. *Long Island R. Co.*, 33 N. Y. S. (2d) 993.

C. R. I. & P. Ry. Co. v. *Arkansas*, 219 U. S. 453.

Atlantic Coast Line R. Co. v. *Georgia*, 234 U. S. 280.

Robbins v. *Shelby County Taxing District*, 120 U. S. 498.

ARGUMENT.

I.

The Order of the Interstate Commerce Commission Entered January 21, 1942, Relied Upon by the Plaintiff as Authorizing the Increase of Rates in Question, Is Void for Want of Sufficient Findings of Fact.

It is the first contention of the defendants that the order in question is clearly void when its terms are measured by the constitutional standards for the validity of such orders, as those standards have been repeatedly announced by this court. More particularly, the defendants maintain that the only recitals in the order assuming to state its basis in fact are precisely the sort of statements which have been consistently condemned by this court as wholly inadequate to impart validity to the acts of the Interstate Commerce Commission.

The decisions of this court to be cited and discussed hereafter established two cardinal principles applicable to this case:

First. The firmly established constitutional requisite of due process of law that orders of administrative boards must contain findings of fact, when that requirement is applied specifically to orders of the Interstate Commerce Commission in rate cases and like matters, is *not* met by the mere statement that a schedule of rates is "fair," "reasonable," "necessary to prevent unjust discrimination," or similar generalities of conclusion. On the contrary, the order must set forth, at very least in terms of approximation or estimate, the nature, extent, and proportion of the financial burden entailed upon the carriers by the service for which the rates are charged. In specific application to the instant case, it will be shown that the findings in the order relied upon by the plaintiff

are very similar to findings repeatedly denounced by this court in like cases.

Second. That an order which is unsupported by adequate findings is *void* and hence is vulnerable to collateral and independent attack in equity by the carrier, a shipper or consumer, or the state; so that if the present order is invalid for want of proper findings, the defendants may assail it in these proceedings.

The Findings in the Present Order.

The first two paragraphs of the order (R. 32) recite merely the initiation of the proceedings, the giving of notice, the conducting of hearings, and reception of evidence, and other matters of *procedural history*.

The only matter in the order which even assumes the form of a recital of facts supporting the terms of the order is the third and fourth paragraphs, which are in full as follows (R. 33):

> "*It further appearing*, That the increase in fares proposed is necessary to meet, in part, increased operating expenses incurred or to be incurred by said petitioners because of the payment by them of (a) increased wages to employes, (b) increased cost of materials and supplies, and (c) additional expenditures to safeguard petitioners' properties and operations during the present emergency; the details of which will be stated in a report hereafter to be made respecting the proposed increased freight rates and charges;
>
> "And the Commission does hereby find that the increase in fares proposed is necessary to enable petitioners to continue to render adequate and efficient railway transportation service during the present emergency; and that, upon consideration of said petitions and the evidence of record, that the proposed increased fares will be reasonable and lawful:"

The only other matter which assumes to state the basis for the order is the statement or commentary incorporated in the "report of March 2, 1942" but not in existence at

the time that the order was entered. This matter was not pleaded by the plaintiff and strictly is not accessible to the scrutiny of the court on the pleadings. However, the defendants have reproduced it in full as an appendix to this statement. (Appendix C.).

The following comment as to this additional matter is appropriate:

The supplementary material sets forth in some detail the previous schedule of fares, which schedule, of course, appears in prior orders of the Commission. Neither the order proper nor the report shows any of the following pertinent information:

1. The *total expense of passenger service* or the proportion of total expense of all railway service fairly allocable to passenger service upon a basis apportioning the cost of operating the entire railway system as between freight and passenger service is not set forth. Quite obviously, much equipment—such as tracks, signal and switching facilities, office and general quarters, and the like—as well as the services of many employees, must be used both for freight and passenger service. It is impossible to discover the basis upon which, in the language of the Commission, in Sheet 13 of the report of March 2,

> "the passenger service justly and reasonably should contribute to meeting the added operating costs of the railroad" (Appendix.)

2. Any estimate in terms of dollars and cents, passenger miles, or other terms, of the contemplated effect of the emergency upon passenger revenues. The language most nearly pertinent as a response to the problem of the effect of the emergency upon passenger traffic is the following:

> "Petitioners express confidence that the increase proposed will not curtail the travel volume, which they estimate will not be less in 1942 than it was in 1941. Business and economic conditions are more favorable for rail travel than in 1936 when the present maximum

basis of 3 cents in sleeping and parlor cars and 2 cents in coaches was prescribed by us. An important contributing factor is the recent curtailment of automobile production and a scarcity of rubber tires for automobiles." (Sheet 13 of the report.)

Thus, for aught that appears, the

"recent curtailment of automobile production and a scarcity of rubber tires for automobiles"

may not only

"not curtail the travel volume"

but may so vastly increase it as to render the increase in receipts under *present* rates lucrative to a degree out of all proportion to the increased cost of carrying passengers on cars already running but previously half filled, using stations already built, and otherwise exploiting the facilities and services already available and partially idle.

3. In short, it is quite impossible to discern, either in the text of the order proper or in the supplementary report, which was not available until after the order was supposed to be effective, what the Commission's findings and conclusions may be with respect to the impact of the national emergency upon the railroads. The order and report abound in generalities and categorical pronouncements to the effect that increased costs, wages and other expenses, as well as increase of business, will require increased revenues. But no one can tell how the Commission may have comparatively estimated the rise in wages and prices on the one hand, and the increase in the volume of business, on the other hand.

* * * * *

The court is now respectfully asked, on the one hand, to compare the language above quoted with recitals previously condemned by this court as insufficient to support a valid order; and on the other hand, to contrast that language with findings which *have* been held sufficient to satisfy the requirements of due process of law.

Cases Holding Orders Void for Want of Sufficient Findings and Subject to Collateral Attack in Equity.

The first case relied upon by defendants is that of

State of Florida v. *United States*, 282 U. S. 194.

In that case, as in the present case, the order under consideration was made by the Interstate Commerce Commission. Like the order in the present case, it provided for an increase of rates on intrastate commerce in order to equalize proportionately the burden to be borne by such commerce with that borne by interstate traffic. The findings of the Commission appear at pages 206-207 of the official reporter and are quoted in full in the margin of this statement.*

It will be observed that in the *State of Florida case*, the Commission found in substance that the prevailing rates were

"unreasonable to the extent that they exceeded",

the prescribed new rates; that they would

"result in undue preference and advantage of shippers of intrastate traffic, * * * shippers of interstate

* "We find that the interstate rates on logs, except walnut, cherry and cedar, in carloads, from points on defendant's lines in Florida north of and including Jacksonville, Gainesville, Burnett's Lake, and High Springs, to destinations on its lines in Georgia for distances not exceeding 170 miles are, and for the future will be, unreasonable to the extent that they exceed, or may exceed, the following distance scale of rates in cents per 100 pounds, minimum weight 40,000 pounds, which rates we find are and will be reasonable" (inserting schedule) * * *.

"We further find that the Florida intrastate rates assailed, which are lower than the interstate rates herein found reasonable for corresponding distances, result, and will result, in undue preference and advantage of shippers of intrastate traffic within the State of Florida, in undue prejudice to shippers of interstate traffic from points in the State of Florida to points in the State of Georgia, and in unjust discrimination against interstate commerce.

"We further find that said undue preference and advantage, undue prejudice, and unjust discrimination can and should be removed by the establishment of rates for intrastate application within Florida which shall correspond with the rates herein found reasonable for interstate application from Florida to Georgia.

"We further find that whether the aforesaid rates pertain to transportation in interstate commerce or to transportation in intrastate commerce the transportation services in each instance are performed by defendant under substantially similar circumstances and conditions."

> traffic from points in * * * Florida to points in * * * Georgia, and in unjust discrimination against interstate commerce";

and that such

> "undue preference and advantage * * * should be removed by the establishment"

of the rates fixed by the order.

(It will be recalled that in the order in the *instant* case the Commission found that the increase in fares

> "is necessary to meet, in part, increasing operating expenses * * * because of * * * (a) increasing wages to employees, (b) increasing costs of materials and supplies, and (c) additional expenditures to safeguard petitioner's properties and operations during the present emergency" (R. 33),

and that the increase

> "is necessary to enable petitioners to continue to render adequate and efficient railway transportation service during the present emergency" (R. 33),

it being further stated

> "that the proposed increase in fares will be reasonable and lawful" (R. 33).

The instant order contains no more specific findings.)

This court that the order was invalid and subject to collateral attack in equity by the State of Florida because the findings were insufficient. The court said at page 215:

> "The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this court has recently adverted (*Beaumont, Sour Lake & Western Railway Co.* v. *United States*, decided November 24, 1930, 282 U. S. 74, 51 S. Ct. 1, 75 L. Ed. 221), but of the lack of the basic or essential findings required to support the Commission's order. *In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.* The Commission is the fact-

finding body, and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported. If the facts as to intrastate transportation of logs in Florida are such as to justify an order as to intrastate rates in order to end an unjust discrimination as against interstate commerce either as between persons and localities, or because of an undue burden upon the revenues of the carrier, the Interstate Commerce Commission is still at liberty, acting in accordance with the authority conferred by the statute, to make such determinations as the situation may require.

"We conclude that the portion of the order of the Commission which is now under review, with respect to intrastate rates, is not supported by the findings of the Commission and this part of the order must be set aside." (Emphasis supplied.)

Another decision immediately applicable to the present case is that of

U. S. v. Chicago, M., St. P. & P. R. Co., 294 U. S. 499.

That case involved the validity of an order of the Interstate Commerce Commission in respect to interstate and intrastate rates for the shipment of coal in the Illinois and Indiana coal fields. In that case the Commission refused to approve a schedule of tariffs increasing the rates, so that its ruling was adverse to the carrier. There it was the railroad, not the state, which complained of inadequate findings. The recitals in question appear at page 505 of the official report and are set forth in full in the margin.*

* "We find that the proposed rates if permitted to become effective would lead to a disruption of the rate structure on coal in the Indiana and related areas, thus impairing the revenue of the carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by section 15a of the act; that they would cause a disruption of the individual groups from which the rates are proposed; and that they would cause a disruption of the long-standing rate relation existing for competitive purposes, between the several Indiana groups.

"We find that the proposed rates would be unreasonable and in violation of sections 1(5) (which denounces unreasonable charges) and 15a (2) of the act (which has been summarized above)."

Again affirming its adherence to the constitutional principle requiring that orders of administrative boards be sustained by adequate findings and making clear that evidence without findings is as impotent to sustain such an order as would be findings without evidence in the record, this court said at page 504:

> "This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or *quasi*-jurisdictional facts conditioning its power. *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454. 'In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.' *Florida* v. *United States, supra.* Orderly review requires that this objection, being basic and jurisdictional, be disposed of at the beginning."

Applying this principle to the findings of that case, this court said further at page 507:

> "There is not a fact stated in the report to indicate that it will be unjust or impracticable to apply the new Milwaukee rates to the other lines in Indiana after increasing them by the differentials hitherto prevailing. There is not a fact to indicate that the rates so reduced will be less than compensatory or that capacity for service to the public will be impaired or put in jeopardy. 'The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage.' *Florida* v. *United States, supra*, at p. 214."

We ask the court's especial attention to the following statement at page 508:

> "*At the very least the findings should inform us, if only approximately, of the extent of the expected loss;* they should make it clear whether the impairment of revenues will be trivial or substantial, for only thus can the impairment be related to capacity for service. Cf. *Florida* v. *United States*, 292 U. S. 1, 9."

The similarity between the findings in that case and those in the instant case is very striking. In the cited case there was a finding that the rates would result in

> "impairing the revenue of the carriers * * * and their ability to provide the adequate and efficient transportation service contemplated by section 15a of the act."

In the instant case the recital of the Commission most nearly resembling in its content the finding of a substantial fact is the declaration that

> "the increase in fares proposed is necessary to enable petitioners to continue to render adequate and efficient railroad transportation service during the present emergency" (R. 33).

Thus the essential substance of the findings in the *Chicago and Milwaukee case* last above cited is identical with that of the findings in the present case.

Another utterance of this court declaring the requirement of adequate findings to be constitutional and of the essence of due process of law is that to be found in the case of

> *Wichita R. R. Co.* v. *Public Utilities Commission*, 260 U. S. 48.

The court said at page 58:

> "This conclusion accords with the construction put upon similar statutes in other States. *Public Utilities Commission* v. *Springfield Gas & Electric Co.*, 291 Ill. 209; *Public Utilities Commission* v. *Baltimore & Ohio Southwestern R. R. Co.*, 281 Ill. 405. Moreover, it accords with general principles of constitutional government. The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency

the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its functions. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. *When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.*" (Emphasis supplied.)

In the case of

Atchison Ry. v. United States, 295 U. S. 193,

this court held that an order of the Interstate Commerce Commission purporting to regulate yardage charges was invalid for want of adequate findings. That case was an important one in its bearings upon the economics of transportation. The question presented to the Commission in the proceedings was whether certain services relating to the penning and care of livestock were a final part of the services of the railway as a carrier or were the first phase of the course of commerce after railway transportation had ceased, the livestock being regarded as having been delivered to the consignee so that the services in question were not rendered by the railway as a carrier, but as an additional service for which an extra charge could be made. The purely general and therefore insufficient character of the findings sufficiently appears from the language in which the court pronounces them inadequate to support a valid order. The court said at page 201:

"But the Commission, in respect of the shipments covered by its order, made no definite finding as to what constitutes complete delivery or where transportation ends. Its report does not disclose the basic facts on which it made the challenged order. This court will not search the record to ascertain whether,

by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained. *Florida v. United States*, 282 U. S. 194, 215. *Recently this court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication. Panama Refining Co. v. Ryan*, 293 U. S. 388, 433. See *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, 86. *Interstate Commerce Comm'n. v. Chicago B. & Q. R. Co.*, 186 U. S. 320, 341."

The cases above considered all deal with orders of the Interstate Commerce Commission with the exception of the case of *Wichita R. R. Co. v. Public Utilities Commission*, which involved the order of a state public service commission. Counsel writing this brief perceive no occasion for multiplying citation of other cases of this court and the many decisions of federal and state courts which similarly emphasize as indispensable the requirement that the orders of administrative boards, tribunals and commissions be supported by adequate findings.

However, in concluding our discussion of authorities holding such orders invalid in the absence of such findings, we briefly refer the court's attention to the leading case of

Panama Refining Co. v. Ryan, 293 U. S. 388.

In that case this court, speaking through Mr. Chief Justice Hughes, pronounced invalid the executive order of the President prohibiting the transportation in interstate and foreign commerce of "hot oil and petroleum products," that is, oil and petroleum products produced or withdrawn from storage in excess of prescribed quotas. Neither economic crisis, social emergency, nor the prestige of the Chief Executive was permitted to absolve the order from the requirements of due process of law, or to warrant a

dispensation from constitutional principles. The court said at page 431:

> "There is another objection to the validity of the prohibition laid down by the Executive Order under § 9 (c). The Executive Order contains no finding, no statement of the grounds of the President's action in enacting the prohibition. Both § 9 (c) and the Executive Order are in notable contrast with historic practice (as shown by many statutes and proclamations we have cited in the margin) by which declarations of policy are made by the Congress and delegations are within the framework of that policy and have relation to facts and conditions to be found and stated by the President in the appropriate exercise of the delegated authority."

The court further said at page 432:

> "As the Court said in *Wichita Railroad & Light Co.* v. *Public Utilities Comm'n.*, 260 U. S. 48, 59: 'In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. *When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.* It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We cannot agree to this.' Referring to the ruling in the *Wichita case*, the Court said in *Kahler* v. *Eby*, 264 U. S. 32, 44: 'We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government.'"

Cases Holding Findings Sufficient to Support Orders Entered Thereon.

In order incisively to demonstrate the inadequacy of the findings embodied in the present order, the defendants now ask the court briefly to consider cases in which the findings of administrative commissions *have* been pronounced sufficient to sustain orders based thereon. An examination of such cases will indicate immediately the marked contrast between the character of those findings which have been *approved* and those in the instant case; and it will be readily perceived that the findings in the instant order are indistinguishably similar in substance to the orders condemned (cases cited, *ante*) but vastly different in character from those which have been sustained.

It should be here observed that the defendants have not selected cases in which the findings were virtually perfect merely in order to make more vivid the distinction between the findings in the instant order and those which have been pronounced sufficient or simply to enhance the contrast. On the contrary, we have selected the cases in which, even though the findings have been approved, they have been criticized and censured.

Such a case is that of

U. S. v. Louisiana, 290 U. S. 71.

In that case, the order was seriously assailed on the ground that the findings were inadequate by the State of Louisiana. A district court of three judges acceded to the argument attacking the order and held that the findings were insufficient to support the order.

This court, speaking through Mr. Justice Stone, criticized the findings, but concluded that they contained sufficient substance of fact to support the order.

That case, like the present case, involved an order prescribing an increase in intrastate rates. But in that case,

the Commission (incorporating by reference the findings in collateral proceedings) found that

> "the plan outlined in the appendix we estimate will produce between one million and one hundred and twenty-five million dollars' increased revenue on the basis of present traffic, if applied both state and intrastate."

Summarizing the substantial content of the findings, the court said at page 80:

> "There are no formal requirements for the findings to be made by the Commission in this type of case, see *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 490, and while the particular form in which they were cast here is not to be commended, the report, read as a whole, sufficiently expresses the conclusion of the Commission, *based upon supporting data, including estimates of experienced railroad traffic men, to which the report refers,* that the probability of increased revenue was sufficiently great to make the increase of rates a reasonable exercise of sound managerial judgment. This, we think, meets the requirements of the statute." (Emphasis supplied.)

It will be observed that even when it affirmatively appeared from the order that

> "the conclusion of the Commission, based upon supporting data, including estimates of experienced railroad traffic men, *to which the report refers,*"

the court held that even these findings were

> "not to be commended."

Apparently this case indicates the limit to which the Commission may go in generality without incurring condemnation more severe than adverse criticism.

The court in the *Louisiana case* last cited *distinguishes* the case of *Florida* v. *The U. S.*, 282 U. S. 194, first cited by defendants in the present brief, in the following language at page 79:

> "A question different from that before us was presented in *Florida* v. *United States, supra.* There the

discrimination was essentially one of undue prejudice against shippers, confined by the evidence to rates prevailing in northern Florida. It involved only one railroad and one commodity. It was not the general revenue proceeding authorized by § 15a. The Court was careful to point out that the Commission had undertaken to establish a statewide level of intrastate rates *without any findings with respect to the corresponding interstate traffic which would tend to support the conclusion that a state-wide alteration of intrastate rates was necessary to protect the interstate commerce* involved." (Emphasis supplied.)

Another case indicating the sort of findings which have been upheld by this court is

Georgia Comm. v. *United States*, 283 U. S. 765.

The court said at page 773:

> "*Third.* The appellants contend that the order is void because there are no adequate findings of undue disparity between the rates charged for intrastate transportation in Georgia and the rates actually in force for interstate transportation; and also because there was no finding that the intrastate rates imposed an undue burden upon the carriers' interstate revenues or that the alteration of the intrastate rates would produce additional revenue. The findings in the report are definite and comprehensive. *There are, moreover, illustrative specific findings which confirm the general ones and show that in a real sense, and to a substantial degree, undue prejudice and discrimination to interstate shippers and localities have resulted and will result.*" (Emphasis supplied.)

From the language emphasized above, it appears that there were

> "illustrative specific findings which confirm the general ones"

and that it appears

> "in a real sense, and to a substantial degree, undue prejudice and discrimination"

would result. No such demonstrative material is to be found in the order in the present case.

The Application of the Foregoing Authorities to the Findings in the Instant Case.

The defendants now ask the court to note the immediate force of the decisions considered above in the instant case.

In the case of *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, this court in speaking of the findings of the Commission, said at page 507:

> "There is not a fact to indicate that the rates so reduced will be less than compensatory, or that capacity for service to the public will be impaired or be in jeopardy."

This observation was made notwithstanding a purported "finding" in general terms that the proposed rates would result in

> "impairing the revenue of the carriers * * * and their ability to provide the adequate and efficient transportation service contemplated by section 15a of the act."

In the instant case there is no finding of fact showing that the rates before the authorized increase were confiscatory (R. 32-33).

In the same case the court said at page 508:

> "At the very least the findings should inform us, if only approximately, of the extent of the expected loss."

There is not a word in the findings in the instant case to indicate the "extent" of the inadequacy of the previous rate structure of the "expected loss" or deficit to be anticipated from the previous rates (R. 33-34).

In that case this court expressly condemned the mere pronouncement that

> "the proposed rates would be 'unreasonable,'"

characterizing such pronouncement as

> "a conclusion insufficient as a finding unless supported by facts more particularly stated."

In the present order there is merely the finding that the

> "proposed increased fares will be reasonable and lawful" (R. 33).

In *State of Florida* v. *United States*, 282 U. S. 194, this court similarly pronounced insufficient a mere purported finding that the rates were "unreasonable" and would

> "result in undue preference and advantage to shippers of intrastate traffic,"

and that such

> "undue preference and advantage * * * should be removed"

by the establishment of the rates fixed by the order.

It is respectfully submitted that upon no rational theory can a decision sustaining as valid the order in the instant case be reconciled either with the general principle requiring adequate findings as indispensable to due process of law, or with the clear and specific application of that principle by this court in cases immediately apposite to the instant case.

An Order Invalid for Want of Sufficient Findings Is Subject to Collateral Attack in Equity.

It will be noted that the cases heretofore cited, in which orders of the Interstate Commerce Commission were held invalid, were independent proceedings in equity. It was held without question that the enforcement of a void order would be enjoined in equity. If equity will affirmatively *enjoin* the execution of a void order, necessarily it will refuse its active aid in upholding such an order.

II.

Whether the order of the Commission is valid or invalid, it does not by its terms purport to do more than approve and withdraw federal opposition from the increased rate schedule; and it is still incumbent upon the railroads to procure appropriate authority from the states with respect to intrastate rates.

Under Point I of this statement it was argued that the order of the Interstate Commerce Commission is invalid for want of sufficient finding to support its provisions. If that contention is sound, the plaintiff's case necessarily fails; and the considerations developed under the present Point are academic.

Under the present Point, the defendants urge an independent and distinct objection to the plaintiff's complaint.

The defendants maintain that, without regard to the validity or invalidity of the order, it purports to do no more than remove any restraint existing by virtue of previous orders of the Commission upon the railways of the nation so as to permit them, without federal interference, to seek authority from state legislatures, commissions, or other appropriate agencies for the proposed increase in fares.

In the only decision construing the present order of which the defendants are aware, it was held and, we submit, convincingly demonstrated that the instant order does *not* relieve the railroads of the necessity of procuring state approval for the proposed increase in rates; but that its only effect, even if it is valid, is to express federal consent to the increase.

The case to which defendants refer is *Transit Commission* v. *Long Island R. Co.*, decided by the Supreme Court of New York (Hofstadter, *J.*) on March 6, 1942, 33 N. Y. S.

(2d) 993. For the convenience of the court this opinion is reproduced in full as Appendix A to this brief.

In that case the Transit Commission and the City of New York sued to restrain the defendant railroad companies from putting into effect the increased schedule of intrastate passenger rates contemplated by the order involved in this case. It was admitted that the railroads had not procured state authorization for the increase in rates; but the defendant railroads contended there, as the plaintiff contends here, that the Interstate Commerce Commission had established the increased schedule of rates and had thereby superseded previous tariffs.

The opinion is carefully reasoned and very well expressed. The court recognized, as do the defendants in the present case, that there is no question that the Interstate Commerce Commission has the authority to raise intrastate rates in order to protect interstate commerce. The court, however, reached the conclusion that the Commission *did not intend to exercise that authority*, but that on the contrary, the sole purpose of the order was to withdraw federal opposition to the increase, if the states acceded to requests for such increase.

The substance and import of the argument leading to this conclusion may be thus briefly indicated:

It is, of course, axiomatic that the states are free to control commerce unless and until the federal sovereign, either through congressional enactment or administrative regulation, actually exercises its supreme power over "commerce among the several states." (*C. R. I. & P. Ry. Co.* v. *Arkansas*, 219 U. S. 453; *Atlantic Coast Line R. Co.* v. *Georgia*, 234 U. S. 280; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 498.)

It is to be supposed that if the government of the United States desires to enforce upon the states, the public and

the carriers a vast and comprehensive program of rate or other regulation, it will do so in unmistakable terms.

Not only does the present order fail to use language explicitly and unequivocally expressing an intent to accomplish so important and far-reaching a result as the abrogation of all intrastate rates theretofore existing, but the wording of the order, although doubtless ambiguous, is pregnant with the implication of a contrary intent.

The New York court said on pages 998-999:

"The order of January 21, 1942, contains this provision: 'It is further ordered, that all outstanding orders, as amended, of the Commission, authorizing or prescribing interstate and *intrastate fares*, or bases of fares be, and they are thereby modified, effective concurrently with the establishment of the increased fares herein approved, only to the extent necessary to permit the increase herein authorized, to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of said outstanding orders.

. . . . . .

"This provision, standing altogether by itself, would lend strong support to the claim of the respondents that the Interstate Commerce Commission had intended to increase intrastate rates. Why amend orders dealing with intrastate rates if there was no intention to deal with them? But the provision quoted must be read in the light of the entire order, its preambles as well as its directing provisions. Thus read, it becomes clear that the purpose of the quoted section of the order is merely to render possible action by the state regulatory bodies, to approve similar increases in intrastate rates. In its first preamble the order refers to the fact 'that proper authorities of all states have been notified of this proceeding and *similar* application has been *or will be* made to the regulatory of the respective states for *permission* to increase *similarly* petitioners' *intrastate* rate fares and charges.' In the light of this recitation, it is obvious that in this aspect no more was intended by the order

than to lift any restrictions that might exist barring applications to state regulatory bodies for permission to increase intrastate rates." (Emphasis of the court.)

In approaching the conclusion above expressed, the court considered the findings not merely inadequate to support the order as a valid interference with rates fixed by state commissions, but as evincing an intent *not* to supersede state regulations and as showing, on the contrary, no purpose other than to approve the new rates so far as federal authority was concerned and to sanction alteration of existing rates by state bodies. The court said on pages 997-998:

> "The power of the Interstate Commerce Commission in the premises, thus, cannot be brought in question; nor have the petitioners sought to do so. But the power of the Interstate Commerce Commission to regulate intrastate rates depends upon a finding by it that there exists an unfair discrimination against interstate commerce; and this determination must be based on evidence conforming to a high standard of certainty (*Chicago & North Western Railway Co.* v. *Rockwell Lime Co.*, 373 Ill. 309, cert. den. 311 U. S. 660). In determining whether the orders of the commission relied upon by the respondents actually purport to fix intrastate rates, it is appropriate to bear this rule in mind."
>
> * * * * *
>
> "It is undoubtedly true, as was pointed out by the Supreme Court of the United States in *Railroad Commission of Wisconsin* v. *Chicago B. & Q. R.R.* (257 U. S. 563), that if the railroads are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be, and that the Transportation Act of 1920 may be said to have adopted the policy that the effective operation of the act 'will reasonably and justly require that intrastate traffic should pay a fair proportion of the cost of maintaining an adequate railway system' (*supra*, p. 588). But this is far from saying that the intrastate rates and the interstate rates must be on a parity. The problem of determining what is a fair proportion

of the burden that should be borne by intrastate traffic is one which the Interstate Commerce Commission is required to deal with, and its decisions must be based on finding that low rates for intrastate commerce would constitute an unfair burden on interstate commerce."

In other words, the New York court did not, upon a consideration of the findings, regard them as merely insufficient to support an order installing a new rate structure. On the contrary, the court's reading of the findings convinced it that *it was not even the intent* of the Commission to attempt such comprehensive and far-reaching revision of the rate structure of the country.

Let us observe the terms of the order itself.

In the first paragraph of the recitals the Commission states that

"the petitioning class II and class III railway companies of the United States, and certain other railway companies therein mentioned, and by petition dated December 16, 1941, certain common carriers by water engaged in the transportation of passengers, **seek authority** to increase by 10 percent their freight rates and charges, with certain exceptions not necessary to describe herein, * * *." (Emphasis supplied.)

In this same paragraph the Commission in the following highly significant language recites that it appears that

"similar application has been or will be made to the regulatory authority of the respective states for permision to increase similarly petitioners' intrastate rates, fares, and charges;"

The first paragraph immediately following the recitals merely provides that

"the increased passenger fares as provided by the said petitioners be and they hereby are **approved**,"

the remainder of the paragraph being concerned entirely with provisions where the fare results in a fraction of a cent, or an odd number of cents, where the fares are more than a dollar.

The second paragraph provides that

> "All outstanding orders as amended of the Commission authorizing **or prescribing** interstate and intrastate fares or bases of fares be and they are hereby modified . . . only to the extent necessary to **permit** the increase herein authorized."

Thus the Commission authorizes that rates **prescribed** be modified so as to **permit** the increase in charges.

The remaining three paragraphs of the order merely require tariffs or supplements to refer to the order, provide that increased fares may be made effective upon not less than ten days' notice to the Commission and the public, and retain jurisdiction

> "for the purpose of determining, if need be, the lawfulness of any particular fare or fares resulting from this order."

Surely the Interstate Commerce Commission, conscious of the very powerful influence upon the national economy which would necessarily result from a flat ten per cent increase upon railroad fares throughout the nation, if it intended to command such an increase, would use language unambiguous in meaning and imperative in mood to accomplish its result. It would certainly preface such language with the detailed and specific findings inexorably required by due process of law and the repeated admonitions of this court.

The defendants, therefore, contend that it was not the purpose and is not the effect of the order to impose upon the country a mandatory increase in rates. On the contrary, as the Supreme Court of New York has already observed, the import of the order must be determined by the tenor of the language; and the language does no more than grant the sufferance of the Commission to an increase in rates, provided that the states in turn permit such an increase.

Concluding Observations.

The authority of the Interstate Commerce Commission over the rates of public carriers, both among the several states and within the confines of those states, bestows upon it vast power over the resources of the nation. Such power is granted to it only because public necessity imperatively so requires. But with the necessity for power goes the utmost necessity for the observance of constitutional principles. Unless this precepts defining due process of law are scrupulously attended to, the primary purpose of that power, which is a just and orderly superintendence over the affairs of the nation, will be frustrated.

If it was intended the intent of the Commission to visit upon the nation a blanket ten per cent increase in the cost of transportation, the Commission should have found, at least in terms of estimates and approximations, a factual basis for that increase. It should have at least appraised, if it could not positively compute, in reasonably concrete terms the factors of increased cost and wages; and it should have found their proper relation to revenue resulting from the great press of increased business. In short, the Commission should have obeyed the principles laid down in the cases cited and should have made findings in conformity with those principles. It should then have made its order in unmistakable terms.

But the defendants contend that it was not the purpose of the order in the present case to make mandatory the increase in rates. When the order is construed merely as permitting the railroads to petition the state for an increase of fares, then the findings, although doubtless subject to criticism, might be sufficient to support an order merely permissive in intent; and the order may be given effect, according to its terms.

The defendants therefore contend that the order should be construed as merely permissive; but that if it is interpreted as mandatory, then it is invalid.

Respectfully submitted,

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Of Counsel.

APPENDIX A.

Full text of the opinion in the case of *Transit Commission*, being the Metropolitan Division of the Department of Public Service, petitioner, and *The City of New York*, intervenor-petitioner, v. *The Long Island Railroad Company, The Staten Island Rapid Transit Railway Company* and *The New York Central Railroad Company*, respondents, 33 N. Y. S. (2d) 993.

Supreme Court, New York County,
Trial Term, Part IX.

Commerce—Interstate and Intrastate Railroad Rates—Effect of Order of Interstate Commerce Commission.

(Editorial syliabus)

The order of the Interstate Commerce Commission, made January 21, 1942, for an increase of interstate rates of railroads, does not direct a similar increase of intrastate rates nor is such a direction to be inferred from its provisions or from earlier orders of the Commission. A state state court, though it has no power to set aside an order of the Commission, has jurisdiction to determine whether an order justifies an increase in intrastate rates. Such increase not being justified by the order, and authority therefor not having been obtained from the state regulatory body, a temporary injunction against an increase of intrastate rates should be made permanent. Doubts remaining which may be removed by further clarifying orders of the Commission, the decree should provide that either party may apply for a modification or vacating thereof on the presentation of such further orders.

Transit Commission, being the Metropolitan Division of the Department of Public Service, petitioner, and *The*

City of New York, intervenor-petitioner, v. *The Long Island Railroad Company, The Staten Island Rapid Transit Railway Company* and *The New York Central Railroad Company*, respondents.

Decided March 6, 1942.

George H. Stover, by Philip Hodes, John J. Bennett, Jr., by H. F. R. Mulligan; William C. Chanler, by Herman Horowitz, for petitioners.

Louis J. Carruthers for Long Island Railroad Company; Crabath, DeGersdorff, Swaine & Wood, by Jesse C. Millard, for Staten Island Railroad Company; Clive C. Handy, by T. P. Healy, for New York Central Railroad Company; Martin Conboy, of counsel for all respondents.

HOFSTADTER, *J.*—This is a special proceeding commenced by the Transit Commission, as petitioner, and the City of New York, as intervening-petitioner, against The Long Island Railroad Company, The Staten Island Rapid Transit Railway Company and The New York Central Railroad Company, as respondents. The Attorney-General of the State of New Work has appeared under section 62 of the Executive Law. The petition alleges that the respondents have not complied with section 29 of the Public Service Law, which prohibits any change in rates without the prior approval of the state regulatory body. It has been conceded that such approval has not been obtained and that section 29 has not been complied with. The petitioners invoke the provisions of section 57 of the Public Service Law of the State of New York, which authorizes a proceeding in such case, and seek an injunction to restrain the respondents from carrying out their expressed purpose of raising by 10 per cent. passenger rates charged by them in intrastate traffic.

The respondents contend, however, that an order of the Interstate Commerce Commission, promulgated on the 21st day of January, 1942, permitting an increase of rates of 10 per cent on the part of the petitioning Class I railroads applies to the intrastate as well as to interstate rates of the respondents; and that as a result of this order, the respondents are obliged to increase their intrastate rates so as to make them accord with the authorized interstate rates without the necessity for further recourse to the Transit Commission. It is further argued that this court is without jurisdiction to pass upon the problems presented, inasmuch as exclusive right to deal with orders of the Interstate Commerce Commission of this character has been conferred by Congress upon the federal district courts (Judicial Code, sec. 208, 28 U. S. C. 46).

There can be no question that if this proceeding involves to any extent an effort to "enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission" (sec. 46, *supra*), the only forum in which it might be heard in the first instance is the District Court of the United States. But, the respondents' contention that only the United States courts have jurisdiction after the I. C. C. has made a determination (28 U. S. C. A., sec. 46) depends upon the prior finding of fact that the order of the I. C. C. actually did affect intrastate rates in this state" (Mr. Justice Rosenman, on the application for a temporary injunction, 107 N. Y. L. J., 647, February 11, 1942). Likewise, the refusal by Mr. Justice Eder to grant the application for removal to the federal court recognized that as a preliminary to invoking section 46 of the Judicial Code, it was necessary to determine whether an order of the Interstate Commerce Commission is being reviewed, or if, on the other hand, a statute of this state is sought to be enforced.

Indeed, the Supreme Court of the United States has indicated that suit to enjoin the increase of intrastate

rates on the ground that the increase is prohibited by state laws may be maintained in the state courts even when it is claimed in the answer that an order of the Interstate Commerce Commission requires the increase in question (*American Express Co.* v. *South Dakota ex rel. Caldwell*, 244 U. S. 617-628). In upholding the jurisdiction of the state court the court said:

> "If this were a proceeding professedly 'to enjoin, set aside, annul, or suspend' an order of the Commission 'in whole or in part,' a state court would obviously have no jurisdiction. The bill does not purport to attack, nor does it even refer to any such order. It alleges only that the express companies propose 'increases and advances' in charges for intrastate transportation, by introducing 'existing interstate rates.' It is the answer which sets up the order of the Commission as a justification; and plaintiffs deny that it is such."

The argument of the respondents comes to this: That as a result of the history of the rate regulation of these respondents by the Interstate Commerce Commission, these respondents are required, under relevant orders of that commission, to maintain their intrastate rates at the same level as the rates fixed by the commission for interstate commerce; and that, in any event, reading the order of the commission of January 21, 1942, in the context of the history of the rate regulation of these respondents, it is plain that the respondents are required to increase their rates on intrastate traffic by ten per cent. If this position were sound it would follow that this court is without jurisdiction to deal with the matter and that the injunction must be denied. On the other hand, if an examination of the relevant matters manifest that there is no obligation on the respondents, by virtue of any order or orders of the Interstate Commerce Commission, to increase the respondents' intrastate rates, at the present time, their power and right to do so would necessarily

depend upon their first obtaining the approval of the state regulatory bodies (Public Service Law, sec. 29); and since, concededly, no such approval has in fact been obtained, it would follow that the injunction requested must issue.

Ever since the Shreveport case (234 U. S. 342), it has not been open to doubt that Congress has the power to authorize the Interstate Commerce Commission to fix intrastate rates where such action is necessary to prevent interference with interstate commerce. In 1920, by a general amendment to the Interstate Commerce Act, Congress specifically authorized the Interstate Commerce Commission to fix intrastate rates whenever the commission after full hearings, "finds that any such rate, fare, charge, classification, regulation or practice causes any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust indiscrimination against interstate or foreign commerce" (49 U. S. C. A., sec. 13, 141).

The power of the Interstate Commerce Commission in the premises, thus, cannot be brought in question; nor have the petitioners sought to do so. But the power of the Interstate Commerce Commission to regulate intrastate rates depends upon a finding by it that there exists an unfair discrimination against interstate commerce; and this determination must be based on evidence conforming to a high standard of certainty (*Chicago & North Western Railway Co.* v. *Hockwell Lime Co.*, 373 Ill. 309, cert. den., 311 U. S. 660). In determining whether here, the orders of the commission relied upon by the respondents, actually purport to fix intrastate rates, it is appropriate to bear this rule in mind.

This history of the rate regulation of these respondents by the Interstate Commerce Commission since the Inter-

state Commerce Act of 1920 may be briefly recounted. On July 29, 1920 by an order—pursuant to section 15 (a) of the act, in a proceeding entitled *Ex Parte* 74 (58 I. C. C. 220) —the commission authorized a general increase in interstate passenger fares by 20 per cent. The New York State rate regulatory authority declined, however, to permit an increase of intrastate rates to conform with the increased interstate rate. A proceeding, initiated by the railroads before the Interstate Commerce Commission pursuant to section 13, subdivisions 3 and 4 of the Interstate Commerce Act, resulted in the determination by the commission that the maintenance of the lower rate in intrastate commerce by the State of New York was an unfair discrimination against interstate commerce; and by order dated November 13, 1920 the respondents, among others, were directed to "cease and desists" from continuing the lower rate in intrastate commerce on the ground that such conduct would constitute unjust discrimination against interstate commerce. Though that order explicitly prevented the respondents from maintaining a lower rate in intrastate commerce than that directed for them in interstate commerce, nothing that has been called to my attention justifies the conclusion that either the report of the Interstate Commerce Commission in that proceeding of the order based upon it, established the general principle that intrastate rates must always conform with interstate rates. Indeed, it is exceedingly doubtful whether the commission has power to adopt such a principle of construction and thus dispense with the need for a specific finding in each case that the maintenance of a lower intrastate rate unjustly discriminates against interstate commerce.

It is undoubtedly true as was pointed out by the Supreme Court of the United States in *Railroad Commission of Wisconsin* v. *Chicago B. & Q. R. R.* (257 U. S. 563), that if the railroads are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates

may have been, and that the Transportation Act of 1920 may be said to have adopted the policy that the effective operation of the act "will reasonably and justly require that intrastate traffic should pay a fair proportion of the cost of maintaining an adequate railway system" (*supra*, p. 588). But this is far from saying that the intrastate rates and the interstate rates must be on a parity. The problem of determining what is a fair proportion of the burden that should be borne by intrastate traffic is one which the Interstate Commerce Commission is required to deal with, and its decisions must be based on findings that low rates for intrastate commerce would constitute an unfair burden on interstate commerce.

In 1936, the commission amended its order by requiring a reduction in rates in interstate commerce (214 I. C. C., 174). The order, Exhibit 1, specifically provided that in interstate commerce, rates be reduced to 2 cents per passenger mile in coaches and to 3 cents per passenger mile in Pullman trains. The report of the commission, Exhibit H, upon which the order was based, does not discuss the problem of the relation between intrastate rates to interstate rates, nor does it determine that intrastate rates should be lowered as the result of this order. Indeed, it was assumed by at least one of the respondents here that the order of the Interstate Commerce Commission did not offect its right to maintain the higher rate and it was only after the petitioner initiated proceedings under Section 57 (a) of the Railroad Law that the order of the courts of this state was obtained directing the respondent Long Island Railroad Company to reduce its rates to the level of the interstate railroad rates (*Transit Commission* v. *Long Island Railroad Co.*, 272 N. Y. 27).

Except for intermittent changes during periods of experiment, the 1936 order of the Interstate Commerce Commission remained substantially unchanged until the order of January 21, 1942.

This last order of the commission resulted from a petition by the railroads, among them the respondents, for authority to increase their rates, fares and charges. The petition, Exhibit V, prays for an increase "of 10% in all fares," and also asks "that the cooperation of the State Commissions be invited, as provided by law, in any investigation instituted and conducted by the Commission." The order, Exhibit N, provided "that the increased passenger fares as proposed by the said petitioners be and they are hereby approved." No express statement that the intrastate rates shall be increased is contained in the order (nor so prayed for in the petition). Nor, upon careful analysis of its entire context, read in the light of its antecedent history, can such an inference be drawn from the provisions of the order modifying the prior orders "only to the extent necessary to permit the increase herein authorized"; nor from the fact that the order requires that it be filed in the dockets of the prior proceedings which considered intrastate rates.

(The order of January 21, 1942, contains this provision: "It is further ordered, that all outstanding orders, as amended, of the Commission, authorizing or prescribing interstate and *intrastate fares*, or bases of fares be, and they are hereby modified, effective concurrently with the establishment of the increased fares herein approved, only to the extent necessary to permit the increase herein authorized, to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of said outstanding orders; * * *." This provision, standing altogether by itself, would lend strong support to the claim of the respondents that the Interstate Commerce Commission had intended to increase intrastate rates. Why amend orders dealing with intrastate rates if there was no intention to deal with them? But the provision quoted must be read in the light of the entire order, its preambles as well as its directing provisions. Thus read, it becomes

clear that the purpose of the quoted section of the order is merely to render possible action by the state regulatory bodies, to approve similar increases in intrastate rates. In its first preamble the order refers to the fact "that proper authorities of all states have been notified of this proceeding and *similar* application has been or *will be* made to the regulatory authority of the respective states for *permission* to increase *similarly* petitioners' *intrastate* rate fares and charges." In the light of this recitation, it is obvious that in this aspect no more was intended by the order than to lift any restrictions that might exist barring applications to state regulatory bodies for permission to increase intrastate rates.)

The report upon which the order of January 21, 1942 is based was not before me on the trial, nor until after the final submission and exchange of briefs. It was issued on March 2, 1942. Now that it has been brought to my attention, I have studied it with care and it is to be deemed as part of the record.

Unfortunately there is nothing contained therein which tends to resolve the doubt engendered by the wording of the order itself. The intention or lack of intention to treat with intrastate rates is still obscure, as the report employs the same form of expression found in the order of the commission without further explanatory reference.

I must conclude that under the circumstances of this proceeding it is impossible to hold that there exists any explicit requirement of the Interstate Commerce Commission that the intrastate passenger rates of these respondents must conform to the interstate rates authorized by the order of January 21, 1942, or that the order of January 21, 1942, in any way directs the respondents to increase their passenger rates by 10 per cent in intrastate commerce.

Except only where intrastate rates fixed by state authorities have been found to interfere unduly with inter-

state commerce, the prerogative of the state in regulating railroad rates are not subject to interference by congressional action nor to any powers delegated to the Interstate Commerce Commission. The maintenance of a sound railroad system is of vital concern to the people of the State of New York and that this can be achieved only through the careful supervision of the railroads by a governmental agency conversant with the problems and charged with the high duty of alert and circumspect regulation is a lesson which the last fifty years have taught to the American public at no inconsiderable cost. This is not to doubt either the wisdom or necessity of similar supervision in interstate commerce by federal agencies nor to fail to realize that where a clear conflict exists between state and federal regulation the latter must prevail (*Pennsylvania R. R. Co.* v. *Illinois Brick Co.*, 297 U. S. 447). Only the other day, the Supreme Court of the United States, speaking through the Chief Justice, said: "The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution (*Gibbons* v. *Ogden*, 9 Wheat. 1, 196). It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power" (*United States of America* v. *Wrightwood Dairy Co.*, decided February 2, 1942, 10 U. S. Law Week 4191, at 4192).

While these principles are firmly fixed in the framework of our constitutional law, here neither Congress nor the Interstate Commerce Commission has spoken. The maintenance of the dignity and importance of state regulatory bodies requires that their powers and functions be safeguarded by the courts, and that their authority, where it exists, be fully enforced. The remedies which the re-

spondents have are by appeal directly to the Interstate Commerce Commission itself. "The appropriate remedy," said Mr. Justice Brandeis, "under such circumstances is an application to the Commission requesting it to suspend the operation of the order in so far as it may affect isolated cases and if necessary to enter an independent order dealing specifically with them" (*Georgia Public Service Commission* v. *United States of America, supra*, at p. 772).

The respondents have sought to limit the preamble in the order of January 21, 1942, which recites that *similar* application will be made to state regulatory bodies for permission to increase intrastate rates, to rates for the transportation of milk and cream and rates charged for commutation fares. But the history of the rate regulation of these respondents by the Interstate Commerce Commission forbids such an interpretation. Exhibit R, which is the order of the Interstate Commerce Commission, entered on the 12th day of December, 1927, specifically vacated that portion of the order of November 13, 1929, in so far as it regulated rates for the transportation of "milk, cream, skim milk, butter milk, condensed milk, evaporated milk and pot cheese in intrastate commerce within the State of New York." The right of the state regulatory bodies, therefore, to fix intrastate rates with respect to these commodities from the date of that order was complete. At the same time, the order of the Interstate Commerce Commission of January 21, 1942, in *Ex Parte* 148, as we have seen, provided for an increase in rates "as proposed by the said petitioners." The petition, Exhibit V, specifically includes a proposal by the respondents here that "a uniform increase of 10% in all fares, including rates and charges for milk and cream and articles grouped therewith" be permitted. It is apparent, therefore, that the order of the Interstate Commerce Commission, in *Ex Parte* 148, if held to apply to intrastate rates, would necessarily include rates on milk and cream and the quoted preamble relied on by

the petitioners here could hardly be given the limited scope which the respondents urge.

Again, with respect to commutation fares, the order of the Interstate Commerce Commission of the 13th of November, 1920, Exhibit F, expressly excluded commutation fares from the increase in intrastate rates there ordered. It was, therefore, not necessary to modify that order to permit state regulatory bodies to authorize an increase in commutation fares. Presumably, the Interstate Commerce Commission, *in 1920*, was of opinion that the maintenance of a lower rate for commutation fares did not work a discrimination against interstate commerce, and my attention has not been called to any finding by the commission that any other conclusion was urged by them thereafter.

Finally, the argument limiting the scope of the preamble quoted loses sight of the two words "similar" and "similarly," used in the preamble. What the Interstate Commerce Commission envisaged by its order was a *similar* application to increase similarly petitioners' intrastate rates. To say that these words are limited only to rates for milk and cream and commutation fares would seem to distort the meaning of plain words by arbitrarily contracting their usual, plenary, significance.

Much has been said concerning the continued effectiveness of the order of the Interstate Commerce Commission in docket number 11263, made November 13, 1920, Exhibit F. On the part of the respondents, it is argued that that order is still in force, and in effect requires the maintenance, until further order of the Interstate Commerce Commission, of intrastate rates on a level with interstate rates. Although disavowed in oral argument, the briefs submitted by the respondents frequently make the point that the effect of that order is to require intrastate rates to be maintained permanently at a level with interstate rates. On page 9 of the respondents' reply brief they say: "The cumulative effect of the above is to establish that

the thirteenth section order in docket number 11263 did not die in 1936, but remained in full force and effect as modified, for the purpose of establishing a minimum level for intrastate passenger fares within New York so as to prevent the discrimination which the Commission found would result from a level of intrastate fares within this State lower than interstate fares." This can only mean that the respondents contend that intrastate rates cannot be reduced below interstate rates, regardless of what changes are ordered by the Interstate Commerce Commission in interstate rates, and in spite of continued complete silence, both as to findings and order, with respect to interstate rates. But an examination of the order made by the Interstate Commerce Commission in docket number 11263 reveals that it cannot be made to bear this burden. The order explicitly says that the railroads are directed "to cease and desist" from practicing the undue prejudice against interstate commerce there found and they are directed to establish rates in intrastate commerce comparable to rates then in effect under the order in *Ex Parte* 74. Taken literally, it would mean that the respondents are required to maintain their intrastate rates at the level fixed by the commission for interstate rates in *Ex Parte* 74. But the rates fixed in *Ex Parte* 74 have been several times amended by the commission, the last amendment being authorized in *Ex Parte* 148, by the order of January 21, 1942. There is nothing, either in the order, Exhibit F in docket number 11263, or in any subsequent order of the Interstate Commerce Commission which justifies the conclusion urged by the respondents that the interstate rates of these respondents must be forever maintained at the level of the varying interstate rates authorized by the commission from time to time. Had the commission made such an order, it could not be for this court to question its power to do so. But if the view I entertain is sound, that the commission would be without power to make such a

blanket order for all time—that there is necessary a specific finding in each case or at least recurrently—that discrimination against interstate commerce required it, then it is clear that language more explicit and plain would be required to justify the conclusion that the commission intended that result. I repeat, had the commission made such an order, it would not be subject to review in this court; but I may not agree that the Interstate Commerce Commission would obliquely make an order under circumstances such as these, where its power to do so is open to serious question.

The practice adopted by the railroads in 1920 throws further light on this issue. There too the order increasing railroad rates, in general language, was assumed by the railroad to apply to intrastate rates. But it was not until a separate proceeding was brought under section 13, subdivisions 3 and 4 of the act, before the Interstate Commerce Commission, and an express finding of discrimination against interstate commerce was made that an order of the commission was entered directly dealing with intrastate rates.

Upon the utmost that can be said for the position of the respondents, it remains that the scope of the order of the Interstate Commerce Commission of January 21, 1942, is in doubt. But I am enjoined to resolve such doubt in favor of the right of the state regulatory bodies. As the Supreme Court of Illinois said in *Rockwell Lime Co.* v. *The Commerce Commission* (373 Ill. 309, 319, cert. den. 314 U. S. 600): "Where a serious doubt obtains as to whether an order of the federal Commission extends to intrastate rates, the doubt should be resolved in favor of the exercise of the state's power." To the same effect is the opinion of Mr. Justice Brandeis in *American Express Co.* v. *South Dakota ex rel. Caldwell* (244 U. S. 617).

Where an order is ambiguous, reference may be had to

the report of the commission (*Illinois Commerce Commission* v. *United States of America*, 292 U. S. 474; *Georgia Public Service Commission* v. *United States of America*, 283 U. S. 765).

Presumably, either side to this proceeding is at liberty to apply to the Interstate Commerce Commission for a clarification of its orders. A further order of the Interstate Commerce Commission might very well be entered either explicitly asserting that the matter of intrastate rates in the State of New York has been left to our state regulatory bodies or directing that they be increased to a parity with interstate rates. The decree to be entered herein, therefore, will provide that either party may, at the foot thereof, apply for an order amending the decree modifying the injunction to be granted herein, in part, or vacating it in its entirety.

This proceeding, as I have earlier pointed out, has been brought under the authorization contained in section 57 of the Public Service Law. There, the court is enjoined that "the final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction, or both, issue as prayed for in the petition or in such *modified or other form as the court may determine will afford appropriate relief.*"

Accordingly, a decree will be entered making the temporary injunction permanent; but providing that either side may apply, at the foot of the order, for a modification thereof or to vacate the same upon the presentation of further clarifying orders of the Interstate Commerce Commission.

Findings of fact and conclusions of law having been sufficiently indicated in this opinoin, they are hereby dispensed with.

Settle decree on three days' notice.

The following is a reprint of all of the recitals in the supplemental report of March 21, 1942, which report is relied upon by appellee as sustaining the order in question as that report referred to passenger fares and passenger-train services:

APPENDIX B.

Passenger Fares and Passenger-Train Services.

As stated, no increase is sought in the fares for members of the armed forces traveling on furlough, or in the extra fares applicable on particular trains. The latter fares are excepted for the reason that the services for which they are charged are not directly affected by the recent wage increases. No authority is sought to make effective any increases in the charges for accessorial or allied passenger-train services, such as handling baggage or excess baggage, switching loaded or empty passenger or baggage cars, moving special trains, parking passenger or baggage-car equipment, transporting passenger automobiles, motion picture films, newspapers and periodicals, invalid chairs, and burial cases, and transferring passengers between stations in the same city.

The history of the passenger fares, traffic, and revenues of the railroads in the last several decades may be found in *Passenger Fares and Surcharges*, 214 I. C. C. 174, and *Eastern Passenger Fares in Coaches*, 237 I. C. C. 271, and will not be restated. The basic fares generally in effect throughout the country when the petition was filed were: In sleeping and parlor cars, one way, 3 cents per mile; round trip, in the East, except locally in New England, a descending scale from 3 cents per mile for the shorter hauls to 90 per cent of 3 cents at 900 miles; in the South, 30-day

tickets 2.25 cents, 6-month tickets 2.5 cents; in the West, 60-day tickets 2.25 cents, 6-month tickets 2.75 cents; in coaches, one way, 2 cents per mile in the East and West, and 1.5 cents in the South; round trip, in the East, except locally in New England, a descending scale from 2 cents for the shorter hauls to 1.5 cents at 533 miles, 1.8 cents in the West, and 1.35 cents in the South.

The average revenue per passenger-mile on the class I railroads for 1940 was 2.3 cents in sleeping and parlor cars and 1.51 cents in coaches. On all passenger traffic in the year ended September 30, 1941, the average was 1.754 cents, the lowest rate per mile in railroad history. The average increase per mile proposed is thus not more than 2.3 mills in sleeping and parlor cars, 1.51 mills in coaches, and 1.754 mills on all passenger traffic. In the year ended September 30, 1941, the total passenger revenue was $483,568,775, which was 33.6 per cent less than in 1930, but the number of passenger-miles was 2.82 per cent greater and the average-mile revenue 35.4 per cent less than in 1930.

Petitioners express confidence that the increase proposed will not curtail the travel volume, which they estimate will not be less in 1942 than it was in 1941. Business and economic conditions are more favorable for rail travel than in 1936 when the present maximum basis of 3 cents in sleeping and parlor cars and 2 cents in coaches was prescribed by us. An important contributing factor is the recent curtailment of automobile production and a scarcity of rubber tires for automobiles.

The only protestants against the proposed fare increase are a representative of the State of South Dakota, and an individual who is a frequent passenger, who appeared in his own behalf. The former based his opposition upon the belief that increased fares would discourage travel by rail and would not result in increased revenue to the carriers. The latter, for many years a student of transportation

economics, presented data to show that since 1920, when the last general increase in passenger fares throughout the country became effective, increased fares usually resulted in reduced revenues, and reduced fares in increased revenues. He is convinced that the increase now sought will have the same effect.

Because of the abnormal conditions which now prevail throughout the country we are of the opinion that the increased fares proposed will yield substantial amounts of additional revenues, and that the passenger service justly and reasonably should contribute to meeting the added operating costs of the railroads.

In an appropriate order made in this proceeding on January 21, 1942, we found that the increase in fares proposed is necessary to enable the petitioners to continue to render adequate and efficient railway transportation service during the present emergency, and that the proposed increased fares will be reasonable and lawful. We therein approved the proposed increased fares subject to a suitable rule for the disposition of fractions stated in the order.[2]

All our outstanding orders, as amended, authorizing or prescribing interstate and intrastate fares, or bases of fares, were modified by that order, effective concurrently with the establishment of the increased fares therein approved, to the extent necessary to permit the authorized increase to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, such outstanding orders. We retained jurisdiction for the purpose of determining, if need be, the lawfulness of any particular fare or fares resulting from that order.

2. The rule of fractions provided that when the total increased fares are less than $1, fractions of less than 0.5 cent shall be dropped and fractions of 0.5 cent or greater may be increased to the next whole cent, and that when the total increased fares are more than $1, such fares shall end in 0 or 5, but that no more than 2.5 cents shall be added to the present fares as increased by 10 per cent in order to make such total fares end in 0 or 5.

Increased fares were filed and became effective February 10, 1942.

The foregoing findings as made in our order of January 21, 1942, are here renewed and affirmed.

As pointed out, the petitions of the carriers do not seek to increase the charges for accessorial or allied passenger-train services, certain of which we have named above. Accordingly, the authority granted in our order of January 21, 1942, above referred to, including permission therein to publish and file the increased fares on 10 days' notice, made no reference to charges for such services. Nevertheless, many of the tariffs filed under the purported authority of that order also included increased charges for the accessorial or allied services in addition to increased passenger fares. We have suspended the effective date and entered an order of investigation as to such increased charges. The matter is now pending.

An increase of 10 percent is proposed in the rates and charges on milk and cream, and articles grouped therewith, as published in passenger tariffs. Usually these commodities are carried on passenger trains. This rate proposal will be considered later here. No specific evidence in support of the proposal as to milk and cream was offered by petitioners.